No. _____

941942 MAY 26 1995

IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1994

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

Anne B. Carroll
Marc J. Heimowitz
Cahill Gordon & Reindel
(a partnership including a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Andrew G. Fusco
Thomas H. Newbraugh
Jeffrey A. Ray
Fusco & Newbraugh, L.C.
2400 Cranberry Square
Morgantown, West Virginia 26505
(304) 594-1000

Attorneys for Petitioners

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

91pp

QUESTIONS PRESENTED

Since this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court has not articulated standards to determine when a corporate defamation plaintiff is a public figure. In this case, the defamation plaintiff is one of the nation's largest corporations, a publicly traded, multi-billion dollar company, which has been held to be a private figure under *Gertz*. The questions presented are:

1. Is American Cyanamid Company an all-purpose public figure?

2. Is American Cyanamid Company a limited-purpose public figure with respect to speech about its corporate conduct in marketing a hypertension drug used by hundreds of thousands of people throughout the country?

PARTIES BELOW

The parties before this Court are those set forth in the caption. Upon the death of Roy McKnight, a third-party counterclaim defendant below, on November 6, 1993, his son Stephen was substituted as personal representative of Mr. McKnight's estate.

Rule 29.1 Statement

Pursuant to Rule 29.1, petitioners inform the Court that Mylan Pharmaceuticals, Inc., is a wholly-owned subsidiary of Mylan Laboratories, Inc., a publicly held corporation.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES BELOW ii

RULE 29.1 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Statements at Issue 3

B. The Opinion of the District Court 5

C. The Court of Appeals Decision 8

REASONS FOR GRANTING THE WRIT 9

I. IN THE ABSENCE OF ANY ARTICULATED STANDARDS FROM THIS COURT AS TO WHEN A CORPORATION IS A PUBLIC FIGURE, FEDERAL AND STATE COURTS HAVE ARRIVED AT INCONSISTENT AND CONFLICTING DETERMINATIONS OF CORPORATE PUBLIC FIGURE STATUS .. 9

PAGE

II. THE HOLDING THAT AMERICAN CYANAMID IS NOT A PUBLIC FIGURE IS IN CONFLICT WITH *GERTZ V. ROBERT WELCH, INC.* 16

A. American Cyanamid is an All-Purpose Public Figure 16

B. Alternatively, in the Context of the Instant Controversy, American Cyanamid is a Limited-Purpose Public Figure 20

CONCLUSION 28

APPENDIX 1a

Opinion of the United States Court of Appeals for the Fourth Circuit, March 3, 1995 (vacating the District Court opinion in relevant part and remanding) 1a

Opinion of the United States District Court for the Northern District of West Virginia, July 27, 1993 (dismissing the amended counterclaim for defamation) 19a

Order of the United States District Court for the Northern District of West Virginia, July 27, 1993 (dismissing the amended counterclaim for defamation) 49a

U.S. Constitution Amendment I 51a

U.S. Constitution Amendment XIV, Section 1.... 51a

TABLE OF AUTHORITIES

Cases PAGE

American Benefit Life Insurance Co. v. McIntyre, 375 So. 2d 239 (Ala. 1979) 15, 18n

American Family Mutual Insurance Co. v. Edgar, 23 Media L. Rep. (BNA) 1555 (Wis. Cir. Ct. 1995) 18n, 19n

Bank of Oregon v. Independent News, Inc., 693 P.2d 35 (Or.), *cert. denied*, 474 U.S. 826 (1985) 15, 26n

Beech Aircraft Corp. v. National Aviation Underwriters, 11 Media L. Rep. (BNA) 1401 (D. Kan. 1984) 14, 18n, 19n

Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989) 15, 20n

Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) 10n, 11, 27n

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 11

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 13

Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988) 26-27

Continental Cablevision, Inc. v. Storer Broadcasting Co., 653 F. Supp. 451 (D. Mass. 1986) 13

Coronado Credit Union v. KOAT Television, Inc., 656 P.2d 896 (N.M. Ct. App. 1982) 15, 18n

PAGE

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 19

Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220 (N.J. 1986) 11, 13n

Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (Ark. 1979), *cert. denied*, 444 U.S. 1076 (1980). 26n

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 24n, 25n

FoodScience Corp. v. McGraw-Hill, Inc., 592 F. Supp. 362 (D. Vt. 1984) 27n

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ....*passim*

Golden Bear Distributing Systems, Inc. v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983) 16

Ithaca College v. Yale Daily News Publishing Co., 433 N.Y.S.2d 530 (Sup. Ct. 1980), *aff'd*, 445 N.Y.S.2d 621 (App. Div. 1981) 18n

Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476 (Minn. 1985) 11, 12

Kroll Associates v. City of Honolulu, 833 F. Supp. 802 (D. Haw. 1993) 10n, 19n

Marcone v. Penthouse International Magazine For Men, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 27

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) 12, 13

Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.), *supplemented*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) 20

PAGE

National Life Insurance Co. v. Phillips Publishing, Inc., 793 F. Supp. 627 (D. Md. 1992) 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 3, 6, 9

Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) 14, 18n

Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) 10

Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980) 19

Silvester v. American Broadcasting Cos., 839 F.2d 1491 (11th Cir. 1988) 14, 25

Snead v. Redland Aggregates Ltd., 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994) 10n, 19

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) 16, 27n

Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987) 26

Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) 13

Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417 (N.J. 1995) 13n

U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990) 21n

Vegod Corp. v. American Broadcasting Cos., 603 P.2d 14 (Cal. 1979), *cert. denied*, 449 U.S. 886 (1980) 14, 26n

PAGE

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) 26

WTSP-TV, Inc. v. Vick, 11 Media L. Rep. (BNA) 1543 (Fla. Cir. Ct.), *appeal dismissed*, 475 So. 2d 703 (Fla. Ct. App. 1985) 18n

Constitutional Provisions

U.S. Const. Amend. I.....*passim*

U.S. Const. Amend. XIV.....*passim*

Statutes

Judicial Code
28 U.S.C. § 1254(1) (1988)..... 2
28 U.S.C. § 1291 (1988) 2
28 U.S.C. § 1332 (1988) 2

Law Reviews

K. Dotseth, Note, *Redefining the Corporate "Jellyfish": Corporate Plaintiffs in Defamation Actions*, 14 J. Corp. L. 907 (1989)..... 11

P. Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 Iowa L. Rev. 35 (1982) 12n

J. Hilbert, Comment, *A Criticism of the Gertz Public Figure/Private Figure Test in the Context of the Corporate Defamation Plaintiff*, 18 San Diego L. Rev. 721 (1981) 16

A. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309 (1993)..... 10n

PAGE

Newspapers and other Periodicals

Cowan, *Wall Street: Did the Short-Seller Stumble?*, New York Times, Aug. 19, 1990, § 3 at 14, col. 3 4

First In-First Out ANDA Review Policy, F-D-C Reports (Pink Sheet), Apr. 22, 1991, p. 8 5

Fortune 500, Fortune, Apr. 28, 1986, p. 186 ..... 17n

Marano, *Prescription for Success: Mylan Battles FDA, Market Forces to Succeed in Volatile Industry*, Pittsburgh Bus. Times & J., Nov. 26, 1990, § 3, p. 9 4

Waldholz, *Mylan Labs Unveils Dyazide-Like Drug for Blood Pressure*, Wall St. J., Nov. 9, 1984, at 7, col. 1 ..... 22n

SCRIP, Aug. 14, 1991 ..... 5n

Treatises

R. Sack & S. Baron, *Libel, Slander, and Related Problems* (2d ed. 1994) 10n, 13n

B. Sanford, *Libel and Privacy* (2d ed. 1994) 11

R. Smolla, *Law of Defamation* (1994) 11, 15n, 25n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case, entered on March 3, 1995.

OPINIONS BELOW

The opinion of the court of appeals, *per curiam*, is unreported and is reprinted in the Appendix hereto ("App.") at 1a-18a. The district court opinion is unreported and is reprinted in the Appendix hereto at 19a-48a.

JURISDICTION

The judgment of the court of appeals from which petitioners seek review was entered on March 3, 1995. This petition is being timely filed within 90 days of that decision.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1332 (1988). The court of appeals had jurisdiction to hear the ensuing appeal pursuant to 28 U.S.C. § 1291 (1988). The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution are set forth in the Appendix at 51a.

STATEMENT OF THE CASE

This petition concerns a defamation claim brought by respondent American Cyanamid Company ("Cyanamid") as one of four counterclaims in an action originally filed by petitioner Mylan Pharmaceuticals, Inc. ("Mylan"), in November 1990 in the United States District Court for the Northern District of West Virginia. The original action arose out of a 1984 contract between Mylan and Cyanamid under which Cyanamid's Lederle Laboratories division was granted the exclusive right and license to market a prescription drug for treatment and control of hypertension, Maxzide®, which had been developed and patented by Mylan. Mylan contended (and Cyanamid denied) that Cyanamid had breached the contract in several respects, among them by failing to exert the level of effort in marketing Maxzide® that had been specified in the agreement. Cyanamid named Roy McKnight

("McKnight"), then Mylan's Chairman and C.E.O., as a third-party counterclaim defendant with respect to the defamation count only.

All the claims and counterclaims in the suit were dismissed, some on pretrial motions (including the defamation counterclaim, as to which the district court granted summary judgment in favor of McKnight and Mylan) and the remainder upon a jury verdict after a trial in the fall of 1993. All parties appealed to the United States Court of Appeals for the Fourth Circuit, which upheld the trial court's disposition as to all matters except the grant of summary judgment on Cyanamid's defamation counterclaim. As set out in more detail below, the district court had determined that Cyanamid was a public figure for purposes of the defamation action; that in order to prevail it was obliged to demonstrate that alleged statements of McKnight and Mylan had been made with actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny; and that Cyanamid had failed to make the required showing to withstand the summary judgment motion made by McKnight and Mylan. The Fourth Circuit reversed on the ground that Cyanamid was not a public figure and remanded the counterclaim for adjudication under the less demanding standard of proof applicable to private figure defamation plaintiffs.

A. The Statements at Issue

Cyanamid's defamation counterclaim is based on four statements which it claims were made by Roy McKnight or by Patricia Sunseri, Vice President for Investor and Public Relations of Mylan Laboratories, Inc., petitioner's parent company. The earliest statement, chronologically, was attributed to Sunseri in a *New York Times* article:

> "It's not our intent to license [any branded drug] again," Ms. Sunseri said. She said that after Lederle paid a small up-front fee for the right to sell Maxzide, and oversaw a

> promising launch, the drug languished while Lederle's sales force pushed other products.

Cowan, *Wall Street: Did the Short-Sellers Stumble?*, N.Y. Times, Aug. 19, 1990, § 3, at 14, col. 3; J.A. 459.[1]

The second was attributed to McKnight in an article published in a Pittsburgh business newspaper:

> But less encouraging for Mylan has been its experience with Maxzide . . . . McKnight is not pleased with Lederle's performance, and he issued a strong warning.
>
> "Lederle's sales and efforts have been a great disappointment to us. Lederle literally is not living up to their contract, and if they don't straighten up their act, then we'll have to take whatever steps have to be done to change that," McKnight said.

Marano, *Prescription for Success: Mylan Battles FDA, Market Forces to Succeed in Volatile Industry*, Pittsburgh Bus. Times & J., Nov. 26, 1990, § 3, at 9; J.A. 460.

The third alleged defamatory statement was also by McKnight, as part of a response to a question from the audience about the status of Mylan's lawsuit against Cyanamid. The response was given after a speech he gave at a generic drug industry conference in New York in April 1991. It was subsequently published in an industry newsletter characterized by Cyanamid as a "weekly publication with a broad circulation throughout the pharmaceutical industry" (Cyanamid's memorandum of law in opposition to motion for summary judgment; J.A. 461):

---

[1] References to "J.A. ___" are to materials contained in the parties' Joint Appendix to the Record on Appeal below. References to "Tr. ___" are to the transcript of the trial of this action. References to "Def. Ex. ___" are to exhibits offered by Cyanamid at the trial.

> Our orders from Lederle have really dwindled. In fact, at the moment they're nonexistent. . . . They're digging their hole deeper and deeper.

First In-First Out ANDA Review Policy, F-D-C Reports (Pink Sheet), Apr. 22, 1991, at 7-8; J.A. 317, 624.

The fourth was a statement attributed to Sunseri by Glenn Reicin, a financial analyst at Oppenheimer & Co., Inc., who set forth the following in a report to investors dated July 19, 1991:

> [Mylan's] sales are weak since American Cyanamid has stopped ordering the company's largest selling product, Maxzide (anti-hypertensive). We estimate that Maxzide sales fell in the $15 million area in fiscal 1991. . . . Mylan has sued Cyanamid for not promoting Maxzide to the best of its ability. Mylan wants the product back. Unfortunately, Cyanamid responded with a cut-off in orders for the product.

J.A. 248, 267.[2]

B. The Opinion of the District Court

By opinion filed on July 27, 1993 (reprinted in the Appendix hereto at 19a-48a), the district court, *inter alia*, granted summary judgment to McKnight and Mylan on Cyanamid's defamation counterclaim. (App. 47a) After setting forth the statements which Cyanamid alleged defamed it,

---

[2] Without alleging any additional statements by McKnight or Mylan, Cyanamid also complains of an item in a pharmaceutical industry newsletter which reported on analyst Reicin's report. The item stated, "American Cyanamid has responded to Mylan's $240 million suit against it for alleged violation of a marketing agreement for . . . Maxzide, by ceasing all orders of the product from Mylan, according to . . . Reicin. Mylan has noted that sales of Maxzide were depressed in fiscal 1991; Mr. Reicin estimates that sales could have fallen by $15 million, compared with the previous year." SCRIP, Aug. 14, 1991 (unpaged); J.A. 462-63, 571.

the court analyzed the claims in light of this Court's decisions in *New York Times Co. v. Sullivan*, *supra*, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in order to determine whether Cyanamid was a public or private figure. (App. 41a) If Cyanamid was a public figure, the court observed, it was obliged to demonstrate with convincing clarity that petitioners acted with " 'actual malice,' a constitutional term of art defined as publishing a statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Id.*

The district court then set forth some of the different tests utilized by lower courts after this Court's decision in *Gertz* to determine if a defamation plaintiff is a "limited" or "vortex" public figure for purposes of a libel suit. It found, in essence, that such status is warranted where the speech complained of relates to a public controversy into which the plaintiff voluntarily injected itself through conduct that would foreseeably invite attention and scrutiny, and as to which plaintiff had access to the media and thus "effective opportunities for self-help when defamed." (App. 42a-44a)

The court also observed that special considerations are implicated in the public figure analysis when the plaintiff is a corporation—considerations which, it noted, have not yet been addressed by this Court. These include "the fact that corporations are deemed to be fictional entities who could be said to have no 'reputational interest' or 'feelings'; that an issue of business conduct or 'commercial speech' exists; and that corporations are often 'pervasively visible and powerful economic, political and social forces in American life.' " (App. 45a) The court concluded that

> there is no question that Cyanamid, a large publicly traded international corporation, volunteered for an activity out of which publicity was generated through the comments made by McKnight and Sunseri. It willingly and for well-understood reasons entered into the mar-

> keting agreements with Mylan, which dealt with an important drug for the treatment of hypertension, one which both Cyanamid and Mylan hoped and expected would displace a rival company's drug, Dyazide®, thus generating large profits for both Mylan and Cyanamid. As Cyanamid put it, Mylan needed the 'expertise and resources of a company accustomed to marketing branded pharmaceutical products in order to market the new drug effectively.'

(App. 45a) The district court pointed out that in the pretrial order Cyanamid had itself informed the court that its promotion of Maxzide® was launched

> with virtually unprecedented intensity, using a broad spectrum of media to create product awareness and name recognition quickly, and more importantly, to educate the medical community as to the pharmacological features of the new drug. The launch also included intense selling efforts aimed at drug wholesalers and retailers to ensure well-stocked pharmacy shelves ready to fill prescriptions written as a result of Cyanamid's promotional efforts. After the launch, Cyanamid sustained aggressive marketing and promotional efforts, using a variety of techniques to maintain a high level of awareness of Maxzide® among prescribing physicians.

(App. 45a-46a) The district court continued:

> Maxzide® is, according to Cyanamid, a commercial success, prescribed by tens of thousands of doctors for use by hundreds of thousands of patients, described in textbooks used at medical and pharmacy schools, as well as drug evaluations published by the American Medical Association and other institutions. Certainly, Cyanamid's involvement with this major drug in a highly competitive and regulated industry would lead it to foresee the activity out of which the alleged defamatory statements would occur.

(App. 46a) The district court further determined that Cyanamid had "considerable access to the general and financial media, including . . . the media involved in covering the pharmaceutical industry." (App. 43a)

Concluding that Cyanamid was a limited-purpose public figure for the purpose of this litigation, the district court then determined that the company had failed, in response to the counterclaim defendants' summary judgment motion, to meet its burden of showing that either McKnight or Mylan had spoken the allegedly defamatory statements with actual malice. (App. 47a)

C. The Court of Appeals Decision

In an opinion rendered on March 3, 1995 (reprinted in the Appendix hereto at 1a-18a), the Fourth Circuit reversed the district court as to the defamation counterclaim, ruling that Cyanamid was a private figure and that the matter should proceed "under the standard applicable to a private individual." (App. 7a) The determination under *Gertz* of whether a party is a limited-purpose public figure, it held, turns solely on a two-part inquiry into, first, the existence of a public controversy giving rise to the alleged defamation and, second, the nature and extent of the plaintiff's participation in the controversy. (App. 6a)

The court concluded that there was no public controversy in this case because "[t]he conflict between Mylan and Cyanamid is a purely private contractual dispute," and "[t]he allegedly defamatory statements dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public." (App. 7a) Though acknowledging that Cyanamid had "voluntarily put[ ] itself into the public eye" through the intensity of its efforts in marketing Maxzide®, the court found no relevant connection between that conduct and the subject of the dispute because "the adequacy of Cyanamid's marketing efforts . . .

was not part of Cyanamid's promotional message." (App. 6a-7a) The court did not address McKnight's and Mylan's suggestion that Cyanamid could be held to be an all-purpose public figure.

REASONS FOR GRANTING THE WRIT

I. IN THE ABSENCE OF ANY ARTICULATED STANDARDS FROM THIS COURT AS TO WHEN A CORPORATION IS A PUBLIC FIGURE, FEDERAL AND STATE COURTS HAVE ARRIVED AT INCONSISTENT AND CONFLICTING DETERMINATIONS OF CORPORATE PUBLIC FIGURE STATUS

This case presents the question of when a corporate plaintiff in a defamation action may be categorized as a public figure. In *Gertz v. Robert Welch, Inc.*, *supra*, this Court provided guidance in determining when the actual malice standard of proof established in *New York Times Co. v. Sullivan*, *supra*—*i.e.*, clear and convincing evidence that a defamatory statement was made with knowledge of falsity or reckless disregard for truth or falsity—should be imposed on libel plaintiffs who are not public officials but who nonetheless "have assumed roles of especial prominence in the affairs of society." *Gertz*, 418 U.S. at 345. Some of these public figures, the Court stated,

> occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on

> the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Id. Moreover, the Court stated, "[P]ublic figures usually enjoy significantly greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

In practice, the process of defining over the past 21 years who is and is not a public figure in a defamation suit has often proved to be exceedingly difficult, likened by one frequently quoted court to "trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). The task is especially difficult when the defamation plaintiff in question is a corporation.[3] Since the plaintiff in *Gertz* was an individual, the Court did not have occasion to deal with the

---

[3] *See, e.g., Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993) ("The inquiry becomes even more difficult when the libel plaintiff is a corporation, as our prior cases do not establish a method for determining whether a corporation is a public or private figure."), *cert. dismissed*, 114 S. Ct. 1587 (1994); *Kroll Associates v. City of Honolulu*, 833 F. Supp. 802, 805 (D. Haw. 1993) (defining a public figure "becomes even more difficult where the plaintiff is a corporation, as the cases provide no clear guidelines"); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1271 (D. Mass. 1981) ("Various courts have struggled with the application of *Gertz* and other relevant Supreme Court cases in determining whether a corporation is a public figure for First Amendment purposes, but their conclusions have not been uniform."), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984). *See generally* R. Sack & S. Baron, *Libel, Slander, and Related Problems* § 5.3.8, at 273 (2d ed. 1994) (noting that the "lack of clarity and uniformity in application of public figure-concepts is particularly evident" in the corporate plaintiff context); A. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309, 350 (1993) ("When making the public/private figure determination in these cases, lower courts have struggled with the *Gertz* standards, which arose in a noncommercial setting and are not well-suited to corporate plaintiff cases.") (footnote omitted).

special status of corporations—or whether corporations should be treated at all differently from individuals in determining if they are public figures. Since *Gertz*, the issue of how corporate status interacts with public figure status has not been addressed by this Court. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 492 n.8 (1984) (noting district court holding that corporate petitioner was a public figure and declining, as had the court of appeals, to pass on public figure issue).

The absence of such guidance has frequently been commented on by courts and commentators. *See, e.g., National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 641 (D. Md. 1992) (whether the "public/private figure distinction applies to a corporation has not been explicitly addressed by the Supreme Court [and] . . . circuit decisions have been mixed") (footnote omitted); *Bose Corp. v. Consumers Union, supra*, 508 F. Supp. at 1271 ("[N]o standards have been developed by the Supreme Court for use in determining whether a corporation is a public figure."); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 486 (Minn. 1985) ("The proper application of the *Gertz* categories in cases involving corporate plaintiffs has never been addressed by the United States Supreme Court."); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 228 (N.J. 1986) ("[T]he Supreme Court has yet to address whether corporations or their products can be classified as public figures."); B. Sanford, *Libel and Privacy* § 7.7, at 354.5 (2d ed. 1994) ("[T]he Supreme Court has yet to address squarely the constitutional status of defamation suits in which the plaintiff is not a human being."); R. Smolla, *Law of Defamation* § 2.24[6], at 2-86 (1994) ("The Supreme Court has yet to deal squarely with the application of the public figure test in a corporate plaintiff case."); K. Dotseth, Note, *Redefining the Corporate "Jellyfish": Corporate Plaintiffs in Defamation Actions*, 14 J. Corp. L. 907, 912 (1989) ("[N]either a majority of state courts nor the United States Supreme Court have addressed the issue of corporate public figure status . . . .").

Lack of guidance from this Court has resulted in conflict and confusion among both federal and state courts regarding the application of public figure status to corporations. Some courts have concluded that *Gertz* simply does not apply at all in the corporate defamation plaintiff context; others have purported to apply *Gertz* by concluding that there is no distinction between corporate and individual plaintiffs; still others implicitly combine these approaches by purporting to employ a *Gertz* analysis, all the while recognizing that a corporation is, in some relevant manner, distinguishable from a natural person.

Some courts have determined that the *Gertz* public figure/private figure distinction so ill-fits the corporate defamation plaintiff that an entirely different analysis is required to determine the applicability of the actual malice standard to corporations. *See, e.g., Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955-56 (D.D.C. 1976) (stating that "corporations must be excluded from the *Gertz* holding" because they do not possess the same requisite attributes as an individual, and applying an actual malice standard to corporate plaintiffs "where issues of legitimate public concern are discussed"); *Jadwin v. Minneapolis Star & Tribune Co., supra*, 367 N.W.2d at 487-88 (stating that "the reputational interests of these corporations is *de minimis* compared to the reputational interests of [an individual]," and holding that "corporate plaintiffs in defamation actions must prove actual malice by media defendants when the defendants establish that the defamatory material concerns matters of legitimate public interest in the geographic area in which the defamatory material is published").[4] The determinative factor whether a cor-

[4] *See generally* P. Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 Iowa L. Rev. 35 (1982) (concluding that a corporation should be more susceptible to public figure status than a natural person, given its special characteristics and lesser vulnerability to reputational injury).

At least one libel text has concluded that the very fact that a corporation is publicly held is sufficient to invoke an actual malice standard

porate plaintiff in these jurisdictions must prove actual malice is whether the corporation's activities involve the public interest, rather than whether the corporation meets the *Gertz* public figure criteria.[5]

At the other extreme, some courts have held that there is no cognizable difference between a corporation and a natural person which would justify any greater protection for defamatory speech about corporate affairs. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589-90 (1st Cir. 1980) (noting that a corporation's interest in protecting its reputation is as important as that of a natural person, and holding that corporations cannot be treated as a class for purposes of First Amendment public figure analysis); *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 653 F. Supp. 451, 460 (D. Mass. 1986) (holding that corporations and natural persons cannot be distinguished as a class); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 819 (N.D. Cal. 1977) (expressly rejecting *Martin Marietta, supra,* and holding that "for purposes of applying the First Amendment to defamation claims, the distinction between

---

with respect to commentary about corporate affairs. *See* R. Sack & S. Baron, *Libel, Slander, and Related Problems, supra*, § 5.3.8, at 273:

> Decisions holding that any *publicly held* corporation is a public figure for purposes of commentary about its corporate affairs are persuasive. When a corporation "goes public" by publicly offering its securities, it has taken a specific, voluntary action, the known result of which will be mandatory, increased public scrutiny. The necessary consequence is publicity. (emphasis in original; footnote omitted)

[5] The New Jersey Supreme Court has held its state constitution's free speech provisions to extend the heightened protection of the actual malice test to speech about those "activities and products of corporations [which] constitute matters of public interest" precisely because "the term 'public figure' . . . ill fits a corporation." *Dairy Stores* v. *Sentinel Publishing, supra*, 516 A.2d at 227, 230; *see also Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 427 (N.J. 1995) (applying the actual malice test to defamatory communications about the consumer activities of businesses that are of "inherent public concern").

corporations and individuals is one without a difference"); *Vegod Corp. v. American Broadcasting Cos.*, 603 P.2d 14, 15 (Cal. 1979) (in bank) (noting that corporations are entitled to the same protection against defamatory speech as individuals, and holding that "[c]riticism of commercial conduct does not deserve the special attention of the actual malice test"), *cert. denied*, 449 U.S. 886 (1980) .

Other courts have struck a middle course, asserting that they were adhering to a *Gertz* public/private figure analysis in the corporate plaintiff context, but nonetheless distinguishing between corporate defamation plaintiffs and natural persons. Because there have been no established standards for determining when a corporate defamation plaintiff is a public figure, these courts have engaged in what is essentially an *ad hoc* determination of public figure status. Often, there is no way to reconcile results across—or even within—jurisdictions, or to determine what factors a court has deemed relevant in its public figure inquiry.

For example, there is a clear split among jurisdictions about whether a corporation's involvement in a highly regulated industry (such as Cyanamid's involvement in the pharmaceutical industry) is germane to a public figure analysis. Some courts have concluded that a corporation invites public scrutiny about its corporate affairs by entering into a highly regulated industry. *See, e.g., Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1497 (11th Cir. 1988) (corporate (and individual) libel plaintiffs held public figures because they "thrust themselves into [a] position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants," thus "invit[ing] public scrutiny, discussions, and criticism"); *Beech Aircraft Corp. v. National Aviation Underwriters*, 11 Media L. Rep. (BNA) 1401, 1411 (D. Kan. 1984) (aircraft manufacturer held a public figure in part because of its involvement in a highly regulated industry); *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977) ("the public interest in

maintaining the free marketplace of ideas must outweigh plaintiff's claim to the sanctity of private status" when reporting concerns the financial transactions of a large, heavily regulated corporation); *American Benefit Life Insurance Co. v. McIntyre*, 375 So. 2d 239, 242 (Ala. 1979) (per curiam) (insurance industry has long been "clothed with the public interest . . . and the power and influence of such a business over society cannot be ignored"; "a corporation whose dealings are subject to close regulation by our state government, and, indeed, whose very existence as an entity is owing to that government" is a public figure); *Coronado Credit Union v. KOAT Television, Inc.*, 656 P.2d 896, 904 (N.M. Ct. App. 1982) (credit union held a public figure in part because it was involved in a comprehensively regulated industry which "involved matters of public concern").[6]

Other courts, including the Fourth Circuit, have all but totally dismissed the highly regulated nature of a corporate defamation plaintiff's industry as a basis for determining public figure status. *See, e.g., Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) (holding that bank is not a public figure and noting that "regulated businesses should be treated no differently from other members of the community"); *Bank of Oregon v. Independent News, Inc.*, 693 P.2d 35, 42 (Or.) (expressly rejecting the analysis in *Coronado, supra*, "in favor of a stricter application of the *Gertz* standard" and declining to hold that a bank is a public figure even though banking is a pervasively regulated business), *cert. denied*, 474 U.S. 826 (1985).

---

[6] These courts implicitly intermingle certain aspects of a public interest analysis with the *Gertz* public figure test, by holding that a corporate plaintiff is a public figure because it is involved in an industry imbued with the public interest. *See* R. Smolla, *Law of Defamation, supra*, § 2.24[6], at 2-86 to 2-87 ("[C]orporations engaging in highly regulated activities, or subjected to special scrutiny or investigation by official agencies, or engaged in unusually aggressive or controversial advertising, are more likely to be deemed public figures.") (collecting cases).

A similar split exists as to whether extensive advertising (such as that engaged in by Cyanamid) has bearing on the public figure status of a corporate plaintiff. *Compare, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (advertising held to have invited public attention and comment and constituted a voluntary injection into a "matter of public interest") *with Golden Bear Distributing Systems, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir. 1983) (holding that the fact of advertising does not render a business a public figure.)

As things now stand, both federal and state courts are in the process of rendering inconsistent, conflicting and inevitably unpredictable decisions about a matter as to which guidance from this Court is sorely needed. In the words of one commentator, "[T]he Supreme Court needs to reenter the area of the first amendment defamation privilege to clarify how the public figure/private figure test is to be applied" to corporations. J. Hilbert, Comment, *A Criticism of the Gertz Public Figure/Private Figure Test in the Context of the Corporate Defamation Plaintiff*, 18 San Diego L. Rev. 721, 742 (1981). We urge the Court to do so in this case involving a ruling that one of this country's largest corporations is a private figure.

II. THE HOLDING THAT AMERICAN CYANAMID IS NOT A PUBLIC FIGURE IS IN CONFLICT WITH *GERTZ V. ROBERT WELCH, INC.*

A. American Cyanamid is an All-Purpose Public Figure

At the heart of this Court's decision in *Gertz* is the notion that commentary on and criticism of those who "have assumed roles of especial prominence in the affairs of society" should be encouraged. "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention," this Court observed, "may recover for injury for reputation only on clear and con-

vincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz, supra*, 418 U.S. at 342.

American Cyanamid is one of the nation's largest corporations. Its annual report trumpets not only its $3.405 billion in total assets and $3.536 billion in net sales, but its 56,790 stockholders and 36,432 employees. "We are," the company proclaims:

> – a leader in pesticides and animal products with strong new product entries.
>
> – one of the fastest-growing pharmaceutical companies in the world.
>
> – one of the top two biological houses in the United States.
>
> – the number one adult multi-vitamin company in the United States and a leader in medical over-the-counter products.
>
> – a leading producer of lower-priced generic pharmaceuticals.
>
> – a leader in aerospace adhesives, polyacrylamides, coating resins and paper chemicals.
>
> – the leader in liquid cleaners in the United States, and we have strong brand names in toiletries and fragrances.[7]

---

[7] The quotations are from Cyanamid's 1985 Annual Report which was admitted in evidence. J.A. 3167-3214. In 1985, *Fortune* magazine ranked Cyanamid as the 109th largest U.S. industrial corporation in the country. *Fortune 500*, Fortune, Apr. 28, 1986, at 186-87. In 1990, the year Cyanamid claims it was first defamed by petitioners, it reported sales of $3.4 billion, assets of $4.7 billion and combined selling, advertising, administrative and general expenses of over $1.2 billion. Proxy Statement filed with Securities and Exchange Commission, Dec. 15, 1994, at 10. On or about December 30, 1994, Cyanamid was acquired by American Home Products Corporation for over $9.5 billion. Proxy Statement, *supra*, at 7.

Given its size, its prominence and its corporate power, it is inexplicable why Cyanamid was not held to possess "such pervasive fame or notoriety that [it] becomes a public figure for all purposes and in all contexts." *Gertz*, *supra*, 418 U.S. at 351. The decision finding that Cyanamid is a private figure simply cannot be reconciled with the facts concerning its role in American corporate life, its sheer size and concomitant influence both generally and with respect to the chemical, pharmaceutical, medical, agricultural and other fields of enterprise in which it engages, the extent to which it promotes itself and its products to the public, and its access to the media. Nor can such a finding be reconciled with the conclusions of courts in other jurisdictions with respect to the public status of corporations on far less compelling facts.[8]

---

[8] *See, e.g., Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1348 (plaintiff corporation less than one-third the size of Cyanamid held an all-purpose public figure); *American Benefit Life Insurance Co. v. McIntyre*, *supra*, 375 So. 2d at 242 (insurance corporation subject to close regulation held an all-purpose public figure); *WTSP-TV, Inc. v. Vick*, 11 Media L. Rep. (BNA) 1543, 1544 (Fla. Cir. Ct.) (plaintiff television station subject to "the continuous scrutiny and licensing of a public agency" held an all-purpose public figure), *appeal dismissed*, 475 So.2d 703 (Fla. Ct. App. 1985); *Ithaca College v. Yale Daily News Publishing Co.*, 433 N.Y.S.2d 530, 533-34 (Sup. Ct. 1980) (small and private educational corporation held a public figure for all purposes due to the "public aspects of its formation, character and conduct"), *aff'd*, 445 N.Y.S.2d 621 (App. Div. 1981); *American Family Mutual Insurance Co. v. Edgar*, 23 Media L. Rep. (BNA) 1555, 1556-57 (Wis. Cir. Ct. 1995) (large insurance corporation seeking redress for defamatory speech held a general-purpose public figure). Other courts have engaged in all-purpose figure type analysis and arrived at similar determinations without expressly stating that the corporate plaintiffs in those cases were all-purpose public figures. *See, e.g., Beech Aircraft v. National Aviation Underwriters*, *supra*, 11 Media L. Rep. (BNA) at 1410-11 (aircraft manufacturer held a "public figure" in part due to its size and regulated nature of the industry); *Coronado Credit Union v. KOAT Television*, *supra*, 656 P.2d at 903-04 (corporate credit union held a "public figure" in part due to its size and regulated nature of the industry).

In contrast to the Fourth Circuit's constricted public figure analysis, the Fifth Circuit has articulated a test to determine the public figure status of a corporate defamation plaintiff under which Cyanamid would qualify as an all-purpose public figure. In *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994), the Fifth Circuit held that in determining whether a corporation is an all-purpose public figure, a court should should examine: (i) the "notoriety of the corporation to the average individual in the relevant geographical area"; (ii) "the nature of the corporation's business"; and (iii) "the frequency and intensity of media scrutiny that a corporation normally receives." 998 F.2d at 1329-30.[9]

In view of its enormous size, notoriety and access to the media, coupled with its involvement in one of the most highly regulated industries in the country, Cyanamid satisfies the test for all-purpose public figures enunciated in the Fifth Circuit and in other jurisdictions. There can be no doubt that the company *would* have been found an all-purpose public figure in these jurisdictions.

In fact, Cyanamid is plainly more powerful, influential, and visible than many individuals whom the courts have found to be all-purpose public figures. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967) (well-known college football coach); *Ryan v. Brooks*, 634 F.2d 726, 728 n.2 (4th Cir. 1980) (vice president and general manager of Southern

---

[9] This test has been adopted in the District of Hawaii. *See Kroll Associates v. City of Honolulu, supra*, 833 F. Supp. at 805. Other jurisdictions as well have adopted substantially the same test for determining corporate plaintiff all-purpose public figure status. *See Beech Aircraft v. National Aviation Underwriters, supra*, 11 Media L. Rep. (BNA) at 1410-11 (all-purpose public figure factors include corporate sales and assets, regulated nature of the industry, and extent of regular media exposure); *American Family Mutual Insurance Co. v. Edgar, supra*, 23 Media L. Rep. (BNA) at 1556-57 (all-purpose public figure factors include corporate size and prominence in its industry, the regulated nature of the industry, and corporate name recognition).

Bell Telephone Co. for North Carolina operations); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir.), (secretary-treasurer of the Teamsters union), *supplemented*, 628 F.2d 932 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 1041 (1981). It makes little sense to apply the "actual malice" standard to football coaches, telephone company executives and union officials and not apply it to a multi-billion dollar, publicly held corporation. Indeed, Cyanamid is at the polar extreme of what should be considered a corporate all-purpose public figure. If Wally Butts, John Ryan and Dusty Miller have "especial prominence in the affairs of society" with respect to commentary about their conduct, so too must General Motors, I.B.M.—and American Cyanamid. Under *Gertz*, the Court of Appeals should have held American Cyanamid to be an all-purpose public figure as a matter of law.

B. Alternatively, in the Context of the Instant Controversy, American Cyanamid is a Limited-Purpose Public Figure

Even if one were to accept the proposition that a publicly held, pervasively regulated, intensely scrutinized corporation of Cyanamid's enormous size and influence has *any* "private" reputation in the sense intended by *Gertz*, the Fourth Circuit's holding that Cyanamid is a private figure for purposes of the speech at issue here cannot be sustained. Indeed, the decision below is illustrative of the perverse results that follow when courts lose sight of the essential concerns of *Gertz* and attempt to shoehorn corporate defamation plaintiffs into analytic categories which simply do not take account of the ways in which such plaintiffs may have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," *Gertz*, *supra*, 418 U.S. at 345.[10]

---

[10] *See, e.g., Blue Ridge Bank v. Veribanc, supra*, 866 F.2d at 687-89 (heavily regulated bank prominent in its county of residence that had recently converted from S&L status, had extensively promoted itself, and had demonstrated access to media was not limited-purpose public figure in context of erroneous report that it was at risk of insolvency because

In its decision below, the Fourth Circuit narrowed the inquiry into limited public figure status to a two-part test under which, "[f]irst, a 'public controversy' must exist giving rise to the alleged defamation" and "[s]econd, the nature and extent of the plaintiff's participation in that controversy must be sufficient to justify 'public figure' status." (App. 6a) The court's conclusion that Cyanamid was a private figure was grounded solely in its finding that no public controversy existed because the allegedly defamatory statements arose from "a purely private contractual dispute . . . [and] dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public." (App. 7a) Moreover, the court stated, "the subject of dispute (the adequacy of Cyanamid's marketing efforts) was not a part of Cyanamid's promotional message." *Id.*

The Fourth Circuit's approach thus construes a corporate defamation plaintiff to be a private figure under *Gertz* regardless of the degree to which the corporation has set the stage for adverse comment about its conduct through voluntary actions which placed it in the public spotlight with respect to its conduct—*unless*, that is, the allegedly defamatory statements are explicitly and precisely addressed to the very promotional message the corporation has chosen to send about itself to the public. This approach not only wholly abandons *Gertz*'s command that a plaintiff's access to the media and assumption of the increased risk of defamatory criticism be taken into account on the question of public figure status, but also improperly constricts the definition of "public controversy" for purposes of the limited public figure analysis.

---

there was no "specific pre-existing controversy" regarding bank's financial health); *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 937-39 (3d Cir.) (two large health insurance providers who engaged in advertising war centering on the relative merits of health maintenance organizations and traditional insurance, who had ample access to the media, and who had invited public comment and assumed the risk of unfair comment were not limited-purpose public figures under *Gertz* in context of mutual defamation suits because the allegedly defamatory speech was commercial), *cert. denied*, 498 U.S. 816 (1990).

The record in this case demonstrates beyond dispute the high level of public interest in and attention to the conduct of Cyanamid and Mylan with regard to the very contract at issue here: the very fact of repeated reportage about it in the *New York Times* and other publications itself demonstrates that Cyanamid's alleged breach of contract as to the marketing of Maxzide® is hardly an exclusively "private" matter.

Beyond that, public controversies had long existed with respect to the relative merits of various hypertension medications in general and the merits and marketing of Maxzide® in particular into which Cyanamid directly and aggressively thrust itself. *See, e.g.*, Tr. at 2610-2834. In marketing Maxzide®, Cyanamid maintained in the district court, hundreds of sales representatives of Cyanamid's Lederle division pressed on physicians, among many other promotional items, a brochure whose cover prominently featured the following quote from the November 9, 1984, *Wall Street Journal*: "CLAIMS ABOUT MAXZIDE ARE EXPECTED TO PROMPT MORE DEBATE AMONG PHYSICIANS OVER WHETHER TO CONTINUE PRESCRIBING DYAZIDE";[11] another entitled "The Beta Blocker v. Diuretic Controversy";[12] yet another containing highlights of a international cardiac

---

[11] Waldholz, *Mylan Labs Unveils Dyazide-Like Drug for Blood Pressure*, Wall St. J., Nov. 9, 1984, at 7, col. 1; J.A. 2643. Dyazide® was Maxzide®'s chief competitor in the diuretic class of hypertension drugs and, at the time Maxzide® was launched by Cyanamid, was the number one selling hypertension medication in the United States. Tr. 2629. One of Cyanamid's witnesses, in explaining the company's (unrealized) hope that the FDA would take the unusual step of publicly endorsing Maxzide®, stated:

> [The FDA doesn't] usually do that, but in this situation, it was such an unusual product development story and . . . there was the possibility that they would . . . go public because I know that FDA . . . wanted alternatives to Dyazide.

Tr. 2990.

[12] J.A. 2509.

care symposium, which favorably compared Maxzide® to Diazide® and was introduced with the headline "Is Your Patient at Risk of Sudden Death?";[13] reprints of a medical journal article entitled "Essential Hypertension: New Insights and Controversies in Treatment with Diuretics";[14] and letters calling attention to a Congressional investigation of a scandal involving submission of false data to the FDA by generic drug makers and the subsequent recall of a number of generic drugs, including generic versions of Maxzide®.[15] Cyanamid, in addition, published press releases concerning its marketing of Maxzide®, distributed booklets on the benefits of Maxzide®, and sponsored a three-part cable television network program about hypertension which stressed that diuretic medications (such as Maxzide®) were more effective in reducing deaths from heart attack and stroke than alternative drug therapies.[16] Cyanamid also argued in the district court that it had developed an extensive advertising campaign aimed not only at physicians but also directly at consumers in order to "drive thousands of patients into doctors' offices equipped with product knowledge of MAXZIDE [and] create brand loyalty" among patients themselves.[17]

Cyanamid argued to the district court in its defense, as well, that it had promoted Maxzide® with "virtually unprecedented

---

[13] Tr. 2674, Def. Ex. 585.

[14] Tr. 2671-72.

[15] J.A. 1808-11. A Cyanamid representative testified at trial that the purpose of the letters "was to make the most of the generic drug scandal . . . to reassure doctors if they would specify the Maxzide brand, . . . then the patient would not be switched to a generic that they might not be able to rely on." Tr. 2803; J.A. 1809. A similar letter was sent by Cyanamid's Lederle division to pharmacists, Tr. 2803, which stated, "Unlike certain generics, Lederle's MAXZIDE has not been recalled and, as always, is immediately available for your use." Def. Ex. 675.

[16] J.A. 2509 (press release); J.A. 1820-21 (patient booklets); Tr. 3052, J.A. 2866 (television program).

[17] J.A. 3005.

intensity" and used "a broad spectrum of media to create product awareness and name recognition [and] to educate the medical community as to the pharmacological features of the new drug." Cyanamid claimed to have engaged in "intense selling efforts . . . to insure well-stocked pharmacy shelves ready to fill prescriptions written as a result of Cyanamid's promotional efforts" and "sustained aggressive marketing and promotional efforts, using a variety of techniques." (App. 46a, quoting Cyanamid's Statement of Facts to be Proved at Trial) Cyanamid also boasted that Maxzide® was a commercial success, "prescribed by tens of thousands of doctors for use by hundreds of thousands of patients, described in [medical and pharmaceutical] textbooks as well as drug evaluations published by the American Medical Association and other institutions."[18] (App. 46a)

The district court also determined from the record that Cyanamid had "considerable access to the general and financial media, including . . . the media involved in covering the pharmaceutical industry." (App. 43a) Finally, each statement at issue here, if made at all by petitioners (a factual matter that has not been determined as to all of the complained-of statements), was made in response to questions initiated by either members of the press or drug industry financial analysts. The Mylan-Cyanamid dispute over Maxzide®'s promotion and marketing was plainly one of importance to a public extending far beyond the parties to this suit. (App. 36a-40a; J.A. 317-25)[19]

---

[18] According to Cyanamid, net sales of Maxzide® through 1991 totalled more than $376 million. *See* Amended Answer and Counterclaims ¶¶ 25, 26, 46.

[19] Such facts distinguish this case from *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), where this Court, without reaching the public/private figure issue, held that publication of a false credit report about a small local construction company "to only five subscribers who, under the terms of the subscription agreement, could not disseminate it" was not protected by the constitutional malice standard

Given these and other evidences of pre-existing public concern about and controversies regarding hypertension drugs, of Cyanamid's deliberate actions to fan the controversies in order to promote Maxzide® sales, and of Cyanamid's particular efforts to persuade both the medical community and general public of the effectiveness, reliability, and wide and continued availability of Maxzide®, the Fourth Circuit's conclusion that there was an insufficient nexus between any controversy of public moment and the alleged defamations to warrant limited public figure status for Cyanamid here simply cannot be credited.

First, the statements at issue directly concerned Cyanamid's conduct in marketing and promoting Maxzide®—the very marketing and promotion as to which and through which Cyanamid vigorously, successfully and in every sense *publicly* drew attention to and fostered public reliance on itself. This alone is enough to satisfy the *Gertz* standard that limited public figures are those which "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, *supra*, 418 U.S. at 345; *see Silvester v. American Broadcasting Cos.*, *supra*, 839 F.2d at 1497 (Corporate and individual libel plaintiffs were limited purpose public figures because they "initially thrust themselves into [a] position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants. By becoming

---

because no matter of public concern was implicated by the speech. 472 U.S. at 761-62 (plurality opinion). *Dun & Bradstreet* is noteworthy, as well, for the unanimity apparently exhibited on the Court as to whether equivalent First Amendment protections are granted to media and non-media libel defendants. Professor Smolla appears correct that "all the Justices in *Dun & Bradstreet* either explicitly or implicitly rejected the media/non-media distinction." R. Smolla, *Law of Defamation*, *supra*, § 3.02[2], at 3-9 to 3-10. What is undeniable is that at least five justices explicitly did so. *See* 472 U.S. at 773 (White, J., concurring); 472 U.S. at 781-84 (Brennan, J., dissenting, in an opinion joined by Marshall, J., Blackmun, J., and Stevens, J.).

important members of the regulated . . . industry, they invited public scrutiny, discussions, and criticism.").

Second, in defining the only relevant controversy here as "a purely private contractual dispute" between Mylan and Cyanamid, the Fourth Circuit decision also conflicts with the weight of legal authority concerning how closely an alleged defamation must relate to a particular public controversy in order to justify limited public figure status.[20] Cases generally require no more than that the allegedly libelous statement not be "wholly unrelated" to an ongoing public controversy. *See Tavoulareas v. Piro*, 817 F.2d 762, 774 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *accord Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 620 (2d Cir.) (controversy surrounding individual plaintiffs' status as Roman Catholic clergy made them and their non-profit corporation public figures for purposes of

---

[20] We do not suggest that the Fourth Circuit was alone in its approach. Some other courts have also adopted overly restrictive approaches to the "public controversy" prong of the limited-purpose public figure inquiry as to corporate defamation plaintiffs. *See, e.g., Vegod Corp., supra*, 603 P.2d at 15, 17-18 (corporations that conducted "close-out sale" for landmark department store, heavily advertising the bargains available at the sale, not a limited public figure for purposes of comment about quality and value of merchandise they offered because no public controversy existed); *Bank of Oregon, supra*, 693 P.2d at 37, 42 (bank was not a limited-purpose public figure in context of article reporting charges that it had "engaged in numerous wrongful acts to divert [a customer's] money and credit to another . . . customer" because no public controversy pre-existed the article); *see also, e.g., Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840, 844 (Ark. 1979) (en banc) (attorney suspended from law practice for a year because of unethical conduct whose reinstatement was conditioned on subsequently passing state bar exam was not a public figure for purposes of statement that he had failed that exam, despite the litigation and publicity surrounding his suspension, because no public controversy existed as to his bar exam score), *cert. denied*, 444 U.S. 1076 (1980). The existence of these cases—wrongly decided, we submit, and inconsistent with *Gertz* itself—is itself a powerful reason for this Court to grant the writ and to review this case.

statements that the corporation had been charged with business fraud), *cert. denied*, 488 U.S. 856 (1988); *Marcone v. Penthouse International Magazine For Men*, 754 F.2d 1072, 1082-86 (3d Cir.) (illegal drug trafficking in general was the relevant public controversy for purposes of determining libel plaintiff's public figure status with respect to report implying that he had been convicted of drug dealing charges which had in fact been dismissed), *cert. denied*, 474 U.S. 864 (1985).[21]

When a large, publicly held corporation such as Cyanamid has taken the initiative to throw its massive resources and enormous influence behind the marketing and promotion of a highly-regulated product important to the welfare of hundreds of thousands of people and subject to wide debate and discussion within the medical, pharmaceutical and investment communities, it cannot reasonably be said that speech critical of the marketing and promotion of the product is "purely private" and "d[oes] not deal with any issue that could potentially affect the public"—or that the corporation is a "private figure" as to such speech. Review by this Court is necessary to prevent the kind of misconstruction of *Gertz*'s "public controversy" standard that leads, as it did in the Fourth Circuit here, to a result so at odds with both the letter and spirit of *Gertz*.

---

[21] *And see Steaks Unlimited v. Deaner*, *supra*, 623 F.2d at 273-74 (meat producing company that engaged in intensive advertising campaign through various media was limited public figure with respect to criticism of its advertising and sales practices because it had "voluntarily injected itself into a matter of public interest—indeed, it appears to have created a controversy—for the purpose of influencing the consuming public"); *FoodScience Corp. v. McGraw-Hill, Inc.*, 592 F. Supp. 362, 364-65 (D. Vt. 1984) (corporate defamation plaintiff which manufactured, distributed and promoted through the media a purported "miracle vitamin" was limited public figure for purposes of allegedly defamatory article concerning, *inter alia*, corporation's possible links to organized crime); *Bose Corp. v. Consumers Union*, *supra*, 508 F. Supp. at 1273 (manufacturer of stereo speaker system was limited public figure in part because its own extensive promotional campaign had created a controversy by touting the system's superiority over competing products; the "extent of the plaintiff's advertising alone might very well justify a holding that the plaintiff is a public figure").

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 26, 1995

Respectfully submitted,

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

Of Counsel:

Anne B. Carroll
Marc J. Heimowitz
Cahill Gordon & Reindel
(a partnership including a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Andrew G. Fusco
Thomas H. Newbraugh
Jeffrey A. Ray
Fusco & Newbraugh, L.C.
2400 Cranberry Square
Morgantown, West Virginia 26505
(304) 594-1000

Attorneys for Petitioners